Trujillo v. Apple Computer, Inc. et al Doc. 115

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

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| JOSE TRUJILLO, individually and on behalf of all others similarly situated, | |
| Plaintiff, | No. 07 CV 04946 |
| v. | Judge Kennelly<br>Mag. Judge Ashman |
| APPLE COMPUTER, INC., a California Corporation, and AT&T MOBILITY LLC, a Georgia Corporation, | |
| Defendants. | |

**DEFENDANT AT&T MOBILITY LLC'S MOTION FOR LEAVE TO FILE NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF ITS MOTION TO COMPEL ARBITRATION AND DISMISS ACTION**

Defendant AT&T Mobility LLC ("ATTM") respectfully requests leave to submit this notice to inform the Court of the Illinois Appellate Court's recent decision in *Wigginton v. Dell, Inc.*, __ N.E.2d __, 2008 WL 2267173 (Ill. App. Ct. June 2, 2008) (attached as Exhibit A).[1] This decision is relevant to Trujillo's arguments that ATTM's arbitration provision is procedurally and substantively unconscionable under Illinois law. In *Wigginton*, the Fifth District held that the class waiver in Dell's arbitration provision is unconscionable under Illinois law. But as we discuss below, the Dell provision at issue in *Wigginton* is materially different from ATTM's arbitration provision.

In *Wigginton*, an Illinois resident who had purchased a Dell computer over the telephone filed a class action against Dell, alleging that it had refused to honor a $500 rebate. *Id.* at *1, *3.

[1] The decision in *Wigginton* is not final. As in *Bess v. DirecTV, Inc.*, 885 N.E.2d 488 (Ill. App. Ct. 2008), it is possible that the defendant will seek reconsideration. In addition, it is possible that the defendant will seek review from the Illinois Supreme Court.

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Dell's terms and conditions of sale included an arbitration provision that prohibited class arbitration. *Id.* at *1. The provision also incorporated the rules of the National Arbitration Forum (*id.*), under which, for "consumer claims of under $2,500, the consumer must pay a filing fee of $25 and half of the $150 fee for a hearing" (*id.* at *7). Dell moved to compel arbitration under this provision. The trial court held that the class waiver was unconscionable under Illinois law, severed it, and compelled arbitration without the class waiver. *Id.* at *1.

The Fifth District affirmed. The court first held that "the contract formed between the plaintiff and Dell," which included the arbitration provision and class waiver, was "at least somewhat procedurally unconscionable." *Id.* at *4. In doing so, the court distinguished *Hubbert v. Dell Corp.*, 835 N.E.2d 113 (Ill. Ct. App. 2005), in which the court had "found that [the same Dell arbitration provision] was not procedurally unconscionable." *Wigginton*, 2008 WL 2267173, at *3. The plaintiffs in *Hubbert* "had purchased their computer systems from Dell online." *Id.* When doing so, they were confronted with a statement that "'[a]ll sales are subject to Dell's Term[s] and Conditions of Sale'" and were provided a "blue hyperlink leading online purchasers" to those terms. *Id.* (citing *Hubbert*, 835 N.E.2d at 118, 121–22). The *Hubbert* court had "found that this was sufficient to put consumers on notice that there were terms and conditions that they should inquire about before completing their purchase." *Id.* (citing *Hubbert*, 835 N.E.2d at 122). It also had deemed Dell's arbitration provision to be "conspicuous" because the beginning of Dell's terms stated "that the purchase agreement included a dispute-resolution clause," and the "arbitration clause itself appeared partially in all-capital letters." *Id.* (citing *Hubbert*, 835 N.E.2d at 124).

By contrast, Wigginton had "purchased his phone over the telephone." *Id.* "Unlike the plaintiffs in *Hubbert*," a person who places a telephone order is not "alerted to the fact that the purchase would be subject to terms and conditions that he could easily discover by clicking on a link." *Id.* Although Dell introduced evidence that its "policy was to include the terms and conditions of sale in the packaging for all equipment shipped to customers," the *Wigginton* court explained that, even "[a]ccepting [Dell's] version of events, there is no evidence whatsoever to suggest that the plaintiff had seen the terms and conditions of sale prior to purchasing the computer equipment. This puts him on a very different footing from consumers who purchase equipment online. Returning equipment after selecting, ordering, and paying for the equipment and waiting for it to be shipped is far more onerous than choosing to purchase equipment from a different supplier before making the purchase." *Id.* at *3–*4.

The *Wigginton* court observed that "this fact, standing alone, does not automatically render the [arbitration] provision unconscionable * * *." *Id.* at *4. But because "we are also dealing here with a contract of adhesion," the "combination of unfair surprise and the lack of the ability to bargain over the terms of the contract leads us to conclude that the contract formed between the plaintiff and Dell in the instant case was at least somewhat procedurally unconscionable." *Id.*

The Fifth District further explained, however, that "[t]his conclusion does not end our inquiry": "[U]nder Illinois law, a contract or provision may involve some degree of procedural unconscionability, but that may not be sufficient to render it unenforceable." *Id.* As an example of such a case, the Fifth District identified its recent decision in *Bess v. DirecTV, Inc.*, 885 N.E.2d 488 (Ill. App. Ct. 2008), which also involved "an arbitration provision presented to a consumer retroactively * * *." *Wigginton*, 2008 WL 2267173, at *4–*5. While the court in *Bess* had enforced DirecTV's provision, the *Wigginton* court noted that Dell's arbitration provision lacked two salutory features of the DirecTV provision—the right to arbitrate on a class-wide basis and the right to have the defendant pay any filing fee in arbitration in excess of the applicable filing fee in court. *Id.* at *5. As the court explained, "the cost of vindicating a claim individually"—Dell's provision required the plaintiff to pay $100 to vindicate a $500 claim—"is prohibitively expensive" under Dell's provision (*id.* at *6). "Add to that the attorney fees and the cost of obtaining the necessary evidence, and the cost of vindicating a claim is likely to exceed the potential recovery for most if not all potential Illinois class members," many of whom "will have claims of as little as $250." *Id.* at *7. It accordingly held that "the combination of procedural and substantive unconscionability present here is enough to render the prohibition on class arbitration unenforceable." *Id.*[2]

*Wigginton* provides no basis for holding that ATTM's arbitration provision is unconscionable under Illinois law. Unlike the plaintiff in *Wigginton*, who could not have discovered Dell's arbitration provision until it arrived in the mail with his computers, Trujillo could have obtained ATTM's terms of service (and its arbitration provision) in multiple ways before he activated his iPhone, including when he personally visited an ATTM store to have his credit check run. *See* ATTM Supp. Br. (Dkt. No. 102) 4–5.[3] Moreover, even if Trujillo could not have obtained ATTM's terms of service before he opened the box containing his iPhone, *Wigginton* indicates that presenting an arbitration provision to a consumer "retroactively" makes

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2 Dell argued that its arbitration provision was enforceable under Texas law, relying on a Texas choice-of-law clause in the terms and conditions of sale. But the Fifth District refused to apply Texas law, holding that "it would violate the public policy of this state to enforce a contract that is unconscionable under Illinois law under the circumstances of this case." *Id.* at *5.

3 As we have explained in a prior filing, the iPhone on which Trujillo receives service was purchased at an ATTM store, where the terms of service were readily available. ATTM Supp. Br. (Dkt. No. 102) 4–5. The facts that he purchased another iPhone at an Apple store for the use of Dawn Trujillo and that the terms of service were not readily available at that store are irrelevant to this case. *Id.*

a form contract “at least somewhat procedurally unconscionable,” but “does not end our inquiry”: “[U]nder Illinois law, a contract or provision may involve some degree of procedural unconscionability, but that may not be sufficient to render it unenforceable.” 2008 WL 2267173, at *4.

Thus, whatever it concludes about procedural unconscionability, the Court must also consider whether ATTM’s arbitration provision is substantively unconscionable under *Kinkel v. Cingular Wireless, LLC*, 857 N.E. 250 (Ill. 2006). And as we have explained, ATTM’s arbitration provision—which makes arbitration free and provides affirmative inducements for both customers and their lawyers to invoke individual arbitration—is not in the least bit substantively unconscionable under *Kinkel*. *See* Arb. Mem. (Dkt. No. 37) 8–10; Arb. Reply (Dkt. No. 77) 6–13.

**CONCLUSION**

The Court should grant ATTM leave to file this notice of supplemental authority.

Dated: June 16, 2008

Respectfully submitted,

/s Archis A. Parasharami

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## CERTIFICATE OF SERVICE

I, Archis A. Parasharami, an attorney, I hereby certify that on June 16, 2008, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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